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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, *et al.*,

Petitioners,

v.

CLARK VINCENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position of petitioners requesting that this Court reverse the decision below which held that University of Missouri Regulation 4.0314.0107 is unconstitutional.

Consent to file the attached brief has been sought from the parties. Petitioners have stated that it is their general

policy not to consent to or oppose the filing of *amicus curiae* briefs. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. The Anti-Defamation League believes that religious worship and teaching conducted in public educational institutions violates the First Amendment to the Constitution and fails to promote respect and understanding of individuals' religious differences.

In support of the separation of church and state and the right to free exercise of religion, the Anti-Defamation League has previously filed *amicus* briefs before this Court in numerous cases involving the Religion Clauses of the First Amendment. *E.g., Wolman* v. *Walter,* 433 U.S. 229 (1977); *Meek* v. *Pittinger,* 421 U.S. 349 (1975); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all per-

sons' religious freedoms. It respectfully offers this Court its accumulated experience with the issues raised by this case.

The *Amicus* seeks to submit the accompanying brief because it believes this case presents to this Court a serious challenge to the separation of church and state in our public educational institutions.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

The Anti-Defamation League of B'nai B'rith respectfully submits that the judgment of the United States Court of Appeals for the Eighth Circuit in the above-captioned case should be reversed.

Interest of the *Amicus Curiae*

B'nai B'rith, found in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith

to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is committed to the protection of the civil rights of all persons and towards assuring that every individual enjoys those rights regardless of his or her race or religion.

In its pursuit of these goals, the Anti-Defamation League has, as an important priority, always adhered to the principle that the aforementioned goals and the general stability of our democracy is best served through the separation of church and state. The Anti-Defamation League believes that religious worship and teaching conducted in public educational institutions is violative of the First Amendment to the Constitution and does not promote respect and understanding of individuals' religious differences.

Summary of Argument

Respondents' rights under the Free Exercise Clause were not abridged by University of Missouri Regulation 4.0314.0107. Respondents are able to practice their religion as they desire; they simply have to do so in a private residence 1½ blocks from, rather than on, the campus. The regulation may inconvenience respondents, but it is not coercion which rises to the level of a constitutional violation.

Should the Court find that respondents' Free Exercise rights were violated, it must then determine whether there

are appropriate state interests which override the Free Exercise interest. In the instant case, the Free Exercise claim is outweighed by petitioners' interest in ensuring that the Establishment Clause is not violated. For petitioners to permit religious worship and teaching at public universities would have the principal or primary effect of advancing religion.

When the Free Exercise Clause clashes with a compelling state interest, such as the Establishment Clause, an accommodation may be mandated when the state regulation makes illegal a core practice of a religion or when the state places the individual in a geographic location where the exercise of core religious practices is impossible without an accommodation. Neither of these situations is before the Court in the instant case; thus, no accommodation is required.

This Court has held on numerous occasions that the Establishment Clause forbids the intrusion of religious worship into public educational institutions. These decisions are controlling. The Circuit Court below has suggested, however, that public colleges should be treated differently from public secondary schools for Establishment Clause purposes. The arguments in support of such a bright line distinction are arbitrary and logically indefensible.

ARGUMENT

I.

In order to prevail, petitioners need only demonstrate that the regulation in question is "permissible."

This case comes to the Court in a somewhat different posture from prior cases involving the intrusion of religion into public educational institutions. In cases such as *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), and *Engel* v. *Vitale,* 370 U.S. 421 (1962), the state had actively encouraged religious activity, and therefore the question was whether the state action constituted an impermissible "establishment" of religion. Here, the state has, in the exercise of its discretion, exhibited a sensitivity for "establishment" concerns and has refused to permit religious worship and teaching on school grounds. Thus, the focus of this case is on whether the state has violated respondents' Free Exercise rights (or other constitutionally protected rights). Only if the Court determines that there has been such a violation must the Court reach the question of whether the state's policy is nonetheless constitutionally permissible by virtue of the Establishment Clause or some other valid state interest. *Brandon* v. *Board of Education,* 635 F.2d 971 (2d Cir. 1980); *Dittman* v. *Western Washington University,* No. C79-1189V (W.D. Wash. Feb. 27, 1980), *appeal docketed,* No. 80-3120 (9th Cir. April 7, 1980); *Hunt* v. *Board of Education,* 321 F. Supp. 1263 (S.D. W. Va. 1971).

We submit that, as applied to the facts before this Court, University of Missouri Regulation 4.0314.0107 (the "Uni-

versity Regulation")* is mandated by the Establishment Clause. Nevertheless, this Court need not reach that issue in order to hold for petitioners. As regards the interaction of the state and religion, there are certain state activities which are proscribed, certain which are mandated and certain which are permissible, but are neither proscribed nor mandated. *See Walz* v. *Tax Commission,* 397 U.S. 664 (1970). An example of the permissible type of activity is state reimbursement of funds expended by parents for bus transportation of their children to parochial schools. The state is neither required nor forbidden to provide such reimbursement. *See Everson* v. *Board of Education,* 330 U.S. 1 (1947). The instant case is identical in this regard. In order to hold for petitioners, the Court need not find that the Constitution compelled petitioners to adopt the University Regulation. Rather, it is sufficient to find that petitioners acted within the range of discretionary authority permitted to school officials by the Constitution.

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* Regulation 4.0314.0107, which has been in effect at all campuses of the University of Missouri since 1972, states:

> "No university buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons, under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching . . ."

II.

Respondents' Free Exercise rights have not been abridged.

The Free Exercise Clause embodies the freedom to believe and the freedom to act. "The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940). To demonstrate an infringement of Free Exercise rights, an individual must prove "the coercive effect of the [state] enactment as it operates against him in the practice of his religion." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 223 (1963). In determining whether there has been a violation of the Free Exercise Clause, the Court must examine the relative importance of a particular religious practice and the degree to which the exercise of that practice has been impeded by the state action. *See, e.g., Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Where persons are not significantly encumbered in the practice of their religion, the state action does not constitute a violation of the Free Exercise Clause. *Brandon* v. *Board of Education, supra.*

In the district court, respondents submitted the affidavit of Frederick Chess, a student involved with Cornerstone,* to explain the organization's religious beliefs and practices and the impact of the University Regulation upon such practices.** In the affidavit, Mr. Chess states that for

* Respondents are part of a religious group called Cornerstone which is an officially recognized student group on the University of Missouri-Kansas City (the "University") campus. Cornerstone's stated purpose is to "'promote a knowledge of Jesus Christ among students'." *Chess* v. *Widmar,* 635 F.2d 1310, 1313 (8th Cir. 1980).

** It appears uncontroverted that the regulation does not affect beliefs.

Cornerstone to accomplish its religiously motivated objectives, "we [Cornerstone] must meet together, provide a forum for our message, and have a place for interested students to meet with us." *Chess* v. *Widmar,* 480 F. Supp. 907, 911 (W.D. Mo. 1979), *rev'd,* 635 F.2d 1310 (8th Cir. 1980). Manifestly, there is nothing intrinsic to these practices which relates to whether they need be conducted at the University or off-campus. In fact, Mr. Chess later admits that the group has "of course" continued its religious program and meetings in a house located "only about a block and a half from the campus." 480 F. Supp. at 911, 912.

Cornerstone's holding of its religious meetings a short distance from campus is vivid evidence that the University Regulation has had little, if any, coercive impact upon respondents' practice of their religion. Mr. Chess' affidavit, however, attempts to refute this conclusion by listing the "many unfortunate disadvantages" of Cornerstone being compelled to conduct its meetings off-campus. 480 F. Supp. at 911-12. Some of the "disadvantages" clearly do not rise to the level of a constitutional claim, *e.g.,* there is somewhat more physical space in a University meeting room than at Cornerstone's off-campus meeting place. The other "disadvantages" are, under closer scrutiny, not disadvantages at all, but are simply demands to have the state's imprimatur placed upon Cornerstone, *e.g.,* Cornerstone's proselytizing efforts would be greatly enhanced were it permitted to hold services on campus. The refusal to aid such religious activity is not state action barred by the Free Exercise Clause; rather, it is state action permitted, if not mandated, by the Establishment Clause. *See* Section III, *infra.*

As the district court concluded in finding that respondents' Free Exercise rights had not been infringed by the University Regulation,

> "The facts before this Court simply do not establish that the 'practice' of holding religious services in a university-owned building is a matter of deep religious conviction to these plaintiffs. At most, the parties' stipulations support a finding that plaintiffs *prefer* having their religious services in a university-owned building to having the services in a building or home off-campus." 480 F. Supp. at 917.

As such, the University has not significantly impeded respondents' ability to practice their religion. The University has merely acted so as to ensure that it takes, and is perceived as taking, a neutral position as regards religion.

Moreover, the Free Exercise arguments raised here by respondents have been rejected by this Court. In *McCollum* v. *Board of Education, supra,* students were forbidden to attend religious classes in the public schools. Similarly, in *School District of Abington Township* v. *Schempp, supra,* the Court explicitly rejected the Free Exercise claim of students and teachers who were denied the right to offer prayer in the public schools. 374 U.S. at 225-26.

Courts which have considered this issue have clearly held that the refusal to permit students to worship on the grounds of public elementary and secondary schools does not impose the degree of coercion which rises to the level of a Free Exercise violation. *See* Section V, *infra.* In *Brandon* v. *Board of Education, supra,* the Court of Appeals for the Second Circuit held that the refusal to permit com-

munal prayer meetings in a public high school did not violate the Free Exercise Clause because the students were free to worship together as they pleased "in a church or any other suitable place." 635 F.2d at 977. Similarly, the Appellate Division of the New York Supreme Court held in an analogous situation that students' Free Exercise rights were not contravened since they ". . . are free to pursue their religious beliefs; they are only prevented from enlisting the aid of the public school system to do so." *Trietley* v. *Board of Education,* 65 A.D.2d 1, 8, 409 N.Y.S. 2d 912, 917 (1978). *See also Stein* v. *Oshinsky,* 348 F.2d 999 (2d Cir. 1965), *cert. denied,* 382 U.S. 957 (1965). So too, the Free Exercise rights of respondents have not been violated as they can practice their religion anywhere save on the public university campus.

III.

Petitioners had a valid Establishment Clause interest in promulgating and enforcing the University Regulation.

If this Court finds, however, that petitioners violated respondents' Free Exercise rights, it must then consider whether there are appropriate state interests which override that violation. *Wisconsin* v. *Yoder, supra.* We submit that there are.

To the draftsmen of the First Amendment, "the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668.

A statute violates the Establishment Clause if it does not satisfy all of the following requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with with religion'." *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971). In *Stone* v. *Graham,* —— U.S. ——, 101 S.Ct. 192, 193 (1980), the Court reasserted the vitality of this tripartite test, holding that if a statute violated any part of the test, it must be struck down.

If religious worship and religious teaching (as distinguished from objective teaching about religion) were permitted on the University campus, the principal or primary effect would clearly be to advance religion. As such, the petitioners had a valid Establishment Clause interest in promulgating the University Regulation.

First, permitting Cornerstone to use a campus classroom for religious worship would have the "primary effect" of advancing religion since the "state's tax-supported buildings [would be] used for the dissemination of religious doctrines." *McCollum* v. *Board of Education, supra,* 333 U.S. at 212. *See also Everson* v. *Board of Education, supra,* 330 U.S. at 16. In providing free use of facilities to a religious group, petitioners would in effect be subsidizing religious worship. While this Court has permitted, on a limited basis, some indirect financial support to parochial schools, *e.g., Wolman* v. *Walter,* 433 U.S. 229 (1977), it has never sanctioned this type of direct financial support of religion in the public schools.

Second, the use of public facilities for religious worship and teaching would place the imprimatur of the state upon the religious doctrines being espoused. *School District of Abington Township* v. *Schempp, supra,* 374 U.S. at 215-19; *Dittman* v. *Western Washington University, supra, slip op.* at 5. The significance of having the governmental imprimatur placed upon religious worship is heightened when it is recognized that one of the main goals of many religious groups is to convert others. This is particularly true in the case of Cornerstone whose stated purpose is "to attract the uninvolved." *Chess* v. *Widmar, supra,* 480 F. Supp. at 911. At Cornerstone meetings, non-members are "encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth." *Id.* at 910.

To impressionable college students who are in a transitional period of their lives, this imprimatur can most certainly confuse them as to the proper relationship between church and state. *See* Section V, *infra.* Further, Cornerstone's meetings are open to the public and thus could be attended by persons (including minors) not affiliated with the University. *Chess* v. *Widmar, supra,* 480 F. Supp. at 910, 911. Significantly, Cornerstone is one of the most active organizations on campus, *id.* at 911; and thus, the nature and location of its meetings are assumedly transmitted to a wide spectrum of persons. Many persons not familiar with the University's position of neutrality regarding religion will be misled should Cornerstone—an avowedly religious club—be permitted to hold its worship services on campus.

Third, a ruling for the respondents would undoubtedly result in a proliferation of religiously-oriented activity at the University and other campuses. Conceivably, adherents of large denominations could hold daily services in university assembly halls and on university lawns with thousands of worshippers. In contrast, some small sects might not even have enough followers at a university to be able to, or to want to, have services. Students belonging to these smaller and non-participating groups "will thus have inculcated in them a feeling of separatism when the [public] school should be the training ground for habits of community. . . ." *McCollum* v. *Board of Education, supra,* 333 U.S. at 227 (Frankfurter, J., concurring). If college students wish to attend a school with a sectarian atmosphere, they may do so; public universities must remain a non-sectarian alternative. *See School District of Abington Township* v. *Schempp, supra,* 374 U.S. at 241-42; (Brennan, J., concurring).

On five occasions the Supreme Court has been faced with the question of whether to permit the intrusion of religious practices into public educational institutions, and on each occasion the Court has unequivocally forbidden any such incursion. *Stone* v. *Graham, supra* (posting of Ten Commandments in public schools); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (striking down statutes forbidding teaching of evolution in public schools and colleges); *School District of Abington Township* v. *Schempp, supra,* and *Engel* v. *Vitale, supra* (prayer in public schools); *McCollum* v. *Board of Education, supra* (religious teaching on public school grounds). The principles which guided the Court in these decisions are no less controlling in the instant case.

Illustrative is *McCollum* v. *Board of Education, supra,* where the Court struck down a program permitting teachers employed by private groups to offer religious instruction in the public schools. No students were compelled to attend the classes, and different religious groups had their own classes. The Court held this program to be violative of the Establishment Clause because tax-supported buildings were being utilized for religious teaching, and "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . ." 333 U.S. at 210. Justice Frankfurter, in an oft-cited concurring opinion, stated:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." 333 U.S. at 231.

McCollum mandates the conclusion that petitioners were motivated by proper Establishment Clause concerns in promulgating and enforcing the University Regulation. Were the University to permit respondents and other religious groups to conduct religious teaching in campus buildings, it would be authorizing the very activity proscribed in *McCollum.* The only distinction lies in the fact that *McCollum* involved elementary and secondary schools, while the instant case involves public colleges. This distinction is irrelevant because in both cases, religious groups are aided by being permitted free use of tax-supported buildings. *See also* Section V, *infra.*

This Court's opinions in other cases involving public educational institutions again demonstrate the paramount significance of keeping church and state separate in the schools. As Justice Clark stated in *Schempp,*

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' " 374 U.S. at 225.

A number of lower courts have been faced with analogous fact patterns in which public secondary schools have denied permission to student groups to use classrooms for religious worship or teaching during the school day. These courts have uniformly upheld the schools' position on the grounds that to permit worship in the public schools would violate the Establishment Clause. *E.g., Brandon* v. *Board of Education, supra; Johnson* v. *Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied,* 434 U.S. 877 (1977). As such, petitioners' position should be upheld.

IV.

The strong Establishment Clause interest justifying the University Regulation outweighs respondents' Free Exercise claim.

This Court has held that where the Establishment and Free Exercise Clauses clash, courts must balance the competing interests. In *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 788-89 (1973), the Court made clear that in this balancing process extreme care must be taken to ensure that longstanding Establishment Clause principles are not compromised:

> "... this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e.g., Everson* v. *Board of Education, supra; Walz* v. *Tax Comm'n, supra,* and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion ... However great our sympathy ... for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' *ibid.,* and notwithstanding the 'high social importance' of the State's purposes, *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted."*

* This statement refutes respondents' argument that this Court has made the Establishment Clause subordinate to the Free Exercise Clause. Further, the language of the First Amendment demonstrates clearly that neither clause is predominant over the other.

Decisions of this Court demonstrate that when the Free Exercise Clause clashes with the Establishment Clause (or some other compelling state interest), an accommodation may be required in two situations: (1) when the state regulation makes illegal a core practice of a religion; and (2) when the state places the individual in a geographic location where the exercise of core religious practices is impossible without an accommodation.* Here neither factor is present and thus no accommodation is necessary.

Sherbert v. *Verner, supra,* and *Wisconsin* v. *Yoder, supra,* demonstrate the application of the first type of required accommodation. In *Sherbert,* the Court held that it was a violation of the Free Exercise Clause for South Carolina to apply the eligibility provisions of its unemployment compensation statute so as to deny benefits to a claimant who, because of her religious beliefs, had refused employment which would have required her to work on Saturday. In striking down the state regulation, the Court repeatedly emphasized that Sabattarianism was "one of the precepts of her [appellant's] religion." 374 U.S. at 404. The Court stated that "[n]or is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed [appellant's religion], based upon that religion's interpretation of the Holy Bible." 374 U.S. at 399, n.1.

Similarly, in *Yoder,* an accommodation was required because the state action had impinged upon core practices

* It should be noted that in neither of these situations is an accommodation always required. The competing state interest can be so strong that it outweighs any Free Exercise claim, *e.g.,* in the case of polygamy or ritual murder.

of the respondents' religion. The Court held that the Free Exercise Clause prohibited the state from applying its compulsory education law as to the Amish because this law required them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. The Amish objected to sending their children to public or private school beyond the eighth grade because of a "fundamental belief" that salvation requires life in a church community separate and apart from the world and worldly influence. 406 U.S. at 210.

Of significance is that both *Sherbert* and *Yoder* cite with approval *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). In *Braunfeld*, the Court upheld the constitutionality of Sunday closing laws despite appellants' contention that "this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath." 366 U.S. at 602. The Court did not view the choice so starkly, but admitted that appellants may be forced to absorb "some financial sacrifice in order to observe their religious beliefs." 366 U.S. at 606. Examining *Yoder*, *Sherbert*, and *Braunfeld*, it is clear that where the Free Exercise Clause clashes with an important state interest (such as the state's responsibility not to transgress the Establishment Clause), an accommodation should not be required in all circumstances, but only when an individual's core religious practices have been impinged upon.

An examination of the instant case demonstrates that petitioners have not impeded respondents in the exercise of

any core practices of their religion. Respondents state that their religion requires them to meet together, provide a forum for their teachings and have a place where interested students can meet with them. *Chess* v. *Widmar, supra,* 480 F. Supp. at 911. The University Regulation does not impinge upon these pratices at all. It simply inconveniences respondents in that they have to conduct their services in a house located about 1½ blocks from the campus. If a sincerely-held fundamental tenet of respondents' religion required all services to be held on campus, then respondents might be able to demonstrate that the state has proscribed a core practice. However, as such a showing has not been made, the strong Establishment Clause interest overbalances respondents' Free Exercise claim.

This Court has also recognized that Free Exercise clause interests may override the Establishment Clause interest when the government places an individual in a geographic position where exercise of his core religious practices would be impossible without an accommodation. Examples of accommodations permitted under this theory are chaplains in the army and in prisons. In *School District of Abington Township* v. *Schempp, supra,* the Court rejected the type of Free Exercise argument made by respondents in the instant case, but noted as follows:

> "We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." 374 U.S. at 226, n.10.

This theory would support the type of accommodation requested by the instant respondents where there is an isolated public university, all the students live in dormitories owned by the university and there are no private houses or possible meeting places for miles around. An accommodation would also be permissible where core religious practices had to be performed at an hour when university rules made it impossible to be off-campus. In the instant case, neither of these situations is present as respondents admit that they can meet 1½ blocks from campus at an appropriate time.

In similar factual situations, courts have consistently held that any Free Exercise rights at issue are overridden by the Establishment Clause interest. In *Brandon* v. *Board of Education, supra,* the Second Circuit upheld a public school regulation similar to that imposed by the University. The Second Circuit held that the students' Free Exercise rights had not been abridged, and that if there was any infringement, it was permissible because of the Establishment Clause interests at stake. The court balanced the Free Exercise Clause and Establishment Clause interests and held that an accommodation was only required in certain narrow, well-defined instances:

> "We do not have before us the case of a Moslem who must prostrate himself five times daily in the direction of Mecca, or children whose beliefs require prayer before lunch, sports or other school activities. *Stein* v. *Oshinsky, supra,* 348 F.2d at 1001-02. If faced with these religious demands from students, a school board might have to make additional accommodations to per-

> mit the students to withdraw momentarily from the class. *See Zorach* v. *Clauson*, 343 U.S. 306, 313-14, 72 S.Ct. 679, 683-684, 96 L.Ed. 954 (1952). We have not been convinced, however, that the religious needs of the 'Students for Voluntary Prayer' require such accommodation." 635 F.2d at 977.

Other courts considering the issue have uniformly reached a similar conclusion. *E.g., Stein* v. *Oshinsky, supra; Dittman* v. *Western Washington University, supra.* Succinctly put,

> "This is not a case where plaintiffs are denied access to all public forums for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the establishment clause of the state and federal Constitutions." *Johnson* v. *Huntington Beach Union High School District, supra,* 68 Cal. App. 3d at 17, 137 Cal. Rptr. at 52-53. *See Kent* v. *Commissioner of Education,* —— Mass. ——, 402 N.E. 2d 1340, 1345 (1980).

V.

There is no valid rationale for treating public universities differently from public secondary schools in terms of the use of facilities for religious worship and teaching.

Were the setting for this lawsuit a public secondary school, it appears certain the petitioners would easily prevail. This Court has held on numerous occasions that the Establishment Clause forbids the intrusion of religious worship into such premises. However, those courts which have ruled on this issue in the public university context have reached varied conclusions. The apparent reason for this is that certain courts believe that there are significant differences between high school and college students which permit different applications of the Establishment Clause. Those rationales asserted in favor of disparate application of the Establishment Clause are, we submit, arbitrary and logically indefensible:*

A. In *Tilton* v. *Richardson,* 403 U.S. 672, 686 (1971), the Court, in *dictum,* stated as follows: "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view. . . ." *See also Roemer* v. *Board of Public Works,* 426 U.S. 736, 764 (1976). It has been theorized that college

* It should be noted, however, that even if there were valid, relevant distinctions between high school and college students, respondents should not prevail. Whenever religious worship occurs at a public educational institution, the religious group is being financially supported through the use of taxpayers' funds, by being provided with free rent, heat and electricity. As discussed above, this is a primary effect which aids religion.

students, being less impressionable and less susceptible to religious indoctrination, will be less likely to perceive religious services on public university campuses as government support for religion. Thus, the theory continues, more accommodation is permissible at a public university than at a public secondary school because there would not be a primary effect which aids religion at the university. This theory is, we submit, without merit.

As a logical proposition, there is nothing magical which occurs in the two months between the time when a student graduates from high school and the time when he commences college. He does not automatically become less impressionable. As a matter of fact, experience instructs us that environmental factors render college freshmen at least as, if not more, impressionable than high school seniors. Generally, high school seniors are living a secure existence in which there are many support systems limiting their impressionability. They are living at home, have a group of friends whom they have known for years, belong to a local church or synagogue and feel comfortable in the school they have been attending for the last three or four years.

The student's support systems are, however, suddenly wihtdrawn when he enters college. Generally, he is living away from home (usually for the first time), most of his childhood friends are not attending the same college, he now lives far from his local church or synagogue, and he is in a new and strange environment. This loss of support systems creates in the student the need to create new ties. This need is combined with a feeling that for the first time

he is truly on his own and can explore alternative life choices without fear of parental disapproval. In short, the college freshman is often a seeker open to the possibility of investigating new ideas and religions. For such an impressionable individual, the fact that a religious group is permitted to hold services in university buildings can be significant indeed. The religious group is given instant legitimacy in the student's eyes.

Dr. Kathleen White, associate professor of psychology at Boston University, reports that college students, at least in the early years of college, are in what she characterizes as a "late adolescent" stage. K. White, *Problems and Characteristics of College Students,* Adolescence, Vol. XV (No. 57), pp. 23, 28 (1980). She notes that in this stage the college student is extremely impressionable:

> "The abandonment of conventional-level thinking appears to proceed through a number of identifiable steps. First, late adolescents may pass through a period of conflict and transition, when their moral judgments are marked by internal contradiction and an inconsistent moral relativism. During this 'Stage . . .' adolescents may insist simultaneously that all moral values are arbitrary (so, 'When in Rome . . .'), and that certain principles override all others ('Nothing is more important than human life.'). Such adolescents appear to understand and appreciate the value of individual freedom, but they also show considerable confusion over what is ethical and what is merely conventional." (citations omitted) *Id.* at 28.

This descriptive analysis is supported by empirical evidence on the age at which most individuals become converts to non-traditional religious groups. Some of these non-

traditional religions have been denominated as "cults" in literature on the subject. (See definition of "cult" in C. Stoner and J. Parke, All God's Children 3-4 [1977].) For an individual to renounce the religion of his birth and accept the beliefs and practices of another faith group unquestionably requires that individual to be in an impressionable state. As such, it is not surprising that the typical "cult" member is described as a " 'boy or girl eighteen to twenty-five,' " *id.* at 76, and as a "college student", L. Schwartz and F. Kinslow, *Religious Cults, the Individual and the Family,* Journal of Marital and Family Therapy, Vol. 5 (No. 2), pp. 15, 16 (1979); Stoner and Parke, *supra,* at 68, 76; T. Patrick and T. Dulack, Let Our Children Go! (1976).

B. The Court has suggested that it is particularly important to promote the separation of church and state in the public elementary and secondary school setting since it is there that the state has undertaken as a special mission the education of our youth. *See, e.g., McCollum* v. *Board of Education, supra,* 333 U.S. at 231 (Frankfurter, J., concurring). The Court's pronouncement has been interpreted by some to mean that since the state has embarked upon no such special mission with regard to educating college students, one need not be as vigilant in ensuring separation of church and state in the public university setting. This interpolation is irrelevant as it does not impact upon the considerations utilized by this Court to determine whether the Establishment Clause and the Free Exercise Clause have been violated, to wit, the tripartite test and the extent to which religious practices have been

impeded. Beyond this, however, this theory is based on an incorrect factual premise.

When *McCollum* was handed down in 1948, it was true that the state had not as yet embarked upon a special mission to educate college students. In contrast to elementary and secondary schools, college was perceived as something which could not be experienced by everyone. Private universities were comparatively expensive and exclusive, and there was no clarion call for the state to alter this situation. In 1950, only 40.6% of high school graduates went on to college,* National Center for Education Statistics, Digest of Education Statistics p. 15 (1980), and in Fall, 1948, less than 50% of college students attended public universities. United States Office of Education, 1948 Fall Enrollment in Higher Education, Circular No. 248 (1948).

Today, the nation's perception of higher education has changed dramatically. College is now seen as a valuable experience which is not only for the affluent. Today, 60% of high school graduates go on to college. National Center for Education Statistics, *supra,* at 15. More importantly, it is the state which has undertaken the mission of provid a college education to all our nation's youth. While difficult economic conditions have caused many private universities to shut down and have caused others to raise tuition fees dramatically, public university systems have been expanding. "Open admission" policies have been instituted by a number of public university systems, *e.g.,* New York, California. The statistics on the number of students in public universities versus private universities

* Data on the number of high school graduates going to college is not available for 1948, the year in which *McCollum* was decided.

demonstrate this changed state of affairs. In marked contrast to 1948, the most recent statistics published by the National Center for Education Statistics show that in Fall, 1979, 78.26% of our nation's college students attended public colleges.* *Id.* at 6.

As Professor Lawrence Tribe has noted, "Clearly, the religion clauses embody a concept of the relationship between religion and the state which must be modified to adapt to changing conceptions both of religion and of government." L. Tribe, American Constitutional Law 834 (1978). What was true in 1948 regarding the state's role in college education is not true today. Since the state has undertaken the mission of educating our youth from elementary school through college, there is no longer a valid rationale, if there ever was one, for differing applications of the Establishment Clause.

C. In ruling for the respondents, the Court of Appeals found the instant case distinguishable from one involving high school students who ". . . necessarily require more supervision than do young adults of college age . . ." *Chess* v. *Widmar*, 635 F.2d 1310, 1319 (8th Cir. 1980). While it is debatable whether college students necessarily require less supervision than those in high school, it is true that high schools more often require a teacher's presence at student meetings.

This distinction, however, is of little relevance to the instant case. As even the Eighth Circuit recognized, the

* Unpublished statistics received from the National Center for Education Statistics reveal that in Fall, 1980, the percentage of students in public universities had risen to 78.39%.

question of teacher supervision relates more to the "entanglement" prong of the Supreme Court's tripartite test than to the "effect" prong. 635 F.2d at 1319-20. Neither the district court nor *Amicus* suggests that this case be decided by the "entanglement" prong.

When a public educational institution permits religious worship on campus, it matters little whether or not there is a teacher present during the service. The relevant factor is that the state has placed its imprimatur upon the religious practice by allowing it to be conducted in a campus building in the same manner as all other school-sanctioned extracurricular activities—teacher-supervised in the high school setting but not in the college setting.

VI.

Other arguments raised by respondents are not persuasive.

Respondents argue that the University Regulation constitutes an unconstitutional prior restraint on their free speech rights and also violates the Equal Protection Clause.

These arguments were never addressed by this Court in its decisions on the intrusion of religion into the public school for the obvious reason that to accept such arguments would completely emasculate the Establishment Clause and require the incursion of religion into every aspect of government. Clearly, this is not the way our Constitution was designed to operate.

The University Regulation does not deprive respondents of their right to freedom of speech any more than this Court's decisions in *Engel, Schempp* and *McCollum* denied schoolchildren such rights. Students are not being denied the right to discuss religion, but simply the right to conduct religious worship and teaching in a public university. In such a setting, the Establishment Clause requires certain limitations on speech and associational rights. *Brandon* v. *Board of Education, supra,* 635 F.2d at 980; *Dittman* v. *Western Washington University, supra,* slip op. at 3. Further, a public university is not a "public forum" like a park or the National Mall. *See Synder* v. *Board of Trustees,* 286 F. Supp. 927, 933 (N.D. Ill. 1968). This Court has frequently discussed the paramount importance of keeping religious worship out of our public schools, and as shown in Section V, *supra,* such considerations are equally valid as applied to public universities.

Similarly, the University Regulation does not deprive respondents of their rights to equal protection under the laws any more than schoolchildren were denied such rights in *Engel, Schempp,* and *McCollum.* All groups, including religious groups, are permitted equal access to University facilities for any purpose except religious worship and religious teaching. This limitation on use applies to all groups and is mandated by the Establishment Clause. The Equal Protection Clause does not require what the Establishment Clause forbids. *Brandon* v. *Board of Education, supra,* 635 F.2d at 980; *Trietley* v. *Board of Education, supra,* 65 A.D.2d at 8, 409 N.Y.S.2d at 917.

Conclusion

In this case, the Court is once again called upon to prevent the establishment of religion in an educational institution owned and operated by the state. The Court has uniformly upheld the principle of the separation of church and state in public elementary and secondary schools. There is no legitimate rationale for abandoning this vital principle in the instant context.

Respectfully submitted,

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